No. 94-1039

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Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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REPLY BRIEF OF PETITIONERS

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14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Bowers v. *Hardwick*, 478 U.S. 186 (1986)	5, 9
Gordon v. *Lance*, 403 U.S. 1 (1971)	3
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	2
Holt Civic Club v. *Tuscaloosa*, 439 U.S. 60 (1978)	1
Hunter v. *Erickson*, 393 U.S. 385 (1969)	1, 3
James v. *Valtierra*, 402 U.S. 137 (1971)	2, 3
Kramer v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969)	5
Luther v. *Borden*, 48 U.S. 1 (1849)	2
Maher v. *Roe*, 432 U.S. 464 (1977)	7
Reynolds v. *Sims*, 377 U.S. 533 (1964)	1
San Antonio Indep. Sch. Dist. v. *Rodriguez*, 411 U.S. 1 (1973)	2, 4, 5, 7
Sugarman v. *Dougall*, 413 U.S. 634 (1973)	2, 8
U.S. Terms Limits, Inc. v. *Thornton*, Nos. 93-1456 and 93-1828 (cert. granted June 20, 1994)	10
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)	2, 3
Williamson v. *Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955)	7, 10

REPLY BRIEF OF PETITIONERS

The decision below permanently enjoins the State of Colorado from enforcing the decision of its citizens to limit the authority of their government in an area left open by the Constitution, *i.e.*, whether to grant *extra*-constitutional protections to homosexuals. To justify this extraordinary action, the court below created an expansive new "fundamental right" entitling "any independently identifiable group" to invoke strict federal judicial scrutiny of such state decisions. That right goes well beyond anything this Court sanctioned in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), *Reynolds* v. *Sims*, 377 U.S. 533 (1964), or their progeny.

Respondents do not dispute that those cases—the *only* cases in which this Court has ever refused to accord the traditional presumption of constitutionality to a State's fundamental decisions structuring its own government—all involved suspect racial classifications or burdens on the fundamental right to an equally weighted vote. Respondents concede that they cannot defend the decision below on either of those traditional grounds for heightened scrutiny. Opp. 14-15. And respondents do not deny that in recognition of "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them," *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978), this Court has rejected every previous effort to expand the scope of strict scrutiny in this context.

In seeking to avoid certiorari, respondents are thus left to argue that the expansion worked below is insignificant. Respondents insist that their new "fundamental right to equal access to the process of self-government," Opp. 12, will not invite widespread federal intrusion in state government operations, because it is available to only a subset of citizens—members of "independently identifiable groups." *Id.* at 15-19. The Court need look no further than respondents' strained efforts to define narrowly these "independently identifiable groups," however, to see that

under the decision below "a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group." *James* v. *Valtierra*, 402 U.S. 137, 142 (1971). Respondents' briefs merely reinforce the clear need for this Court's review of the decision below.

1. "Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 44 (1973). That tension is at its zenith where, as here, the challenged decision involves a State's discharge of its "constitutional responsibility for the establishment and operation of its own government," and this Court has consistently recognized that equal protection "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (citations omitted).[1]

In arguing that this Court's decisions in *Hunter* and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), can be read to sanction strict federal scrutiny of *any* state decision allocating authority among political subdivisions that "burdens" an independently identifiable group, respondents completely ignore—as they must—this established constitutional respect for state autonomy. Respondents also ignore that both *Hunter* and *Seattle School District* repeatedly stress that it was suspect racial classifications, *not* fundamental rights, that

[1] *See also Gregory* v. *Ashcroft*, 501 U.S. 452, 461-63 (1991) (acknowledging the "unique nature of state decisions that go to the heart of representative government," and noting that "while the Equal Protection Clause provides a check on such state authority, our scrutiny will not be so demanding") (internal quotations and citations omitted); *Luther* v. *Borden*, 48 U.S. 1, 47 (1849) ("[T]he sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure").

triggered strict scrutiny.[2] Indeed, neither case even mentions, much less defines, any such fundamental right.[3]

Any doubt on this issue is fully resolved by *Valtierra*, in which, as respondents concede, this Court affirmed an otherwise indistinguishable "referendum requirement [that] did not target any racial group," Opp. 7, noting, "[t]he present case could be affirmed only by extending *Hunter, and this we decline to do.*" 402 U.S. at 141 (emphasis added). The "any particular group" phrase had meaning in *Hunter* v. *Erickson*, 393 U.S. 385 (1969) only because of the suspect class context, and *Valtierra* clarifies that it is limited to that context. Expanding it beyond suspect classes gives this "right" a breathtaking sweep that warrants review by this Court.[4]

[2] *See, e.g., Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 477 n.18 (1982) ("The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests"); *id.* at 480 n.23 ("[W]hat we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of decisionmaking"); *id.* at 485-86 n.29 ("It is the State's race-conscious restructuring of its decisionmaking process that is impermissible"); *id.* at 486 ("*Hunter* . . . rested on a principle that has been vital for over a century—that 'the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race' "); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969) ("Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, . . . racial classifications are 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' ") (internal citations omitted); *id.* at 391 ("§ 137 places special burdens on racial minorities within the governmental process").

[3] Respondents place great emphasis on the fact that *Hunter* twice cites *Reynolds* and another voting rights case. In both instances, however, the Court (using *cf.* citations) merely noted that directly burdening a suspect class "is *no more permissible* than denying them the vote, on an equal basis with others." *Hunter*, 393 U.S. at 391 (emphasis added); *see also id.* at 393.

[4] Respondents' heavy reliance on *Gordon* v. *Lance*, 403 U.S. 1 (1971), is puzzling. The Court there rejected *both* approaches

Respondents' attempt to fit the lower court's decision within this Court's fundamental "right to vote" cases is also unavailing. Although respondents' exhaustive search of the case law produced snippets of expansive dicta concerning the unquestioned *importance* of political participation, they failed to uncover a single decision recognizing a *fundamental constitutional right* in this context that extends beyond the right to have one's *vote* counted equally.

In this regard, respondents' willingness to embrace the "essential principle that the equal protection clause of the Fourteenth Amendment forbids the exclusion of *persons* from the political process, not the preemption of *issues*," Opp. 16, is revealing. Amendment 2 preempts the electorate's representatives on only a narrow set of *issues*—whether homosexuals will receive extra-constitutional benefits or protections. No *persons* are excluded from anything. Those who favored the substance of respondents' position—the vast majority of whom were *not* homosexuals—had an equal vote on Amendment 2. After Amendment 2 homosexuals in Colorado have exactly the same right to vote in *all* elections and referendums as every other citizen. And after Amendment 2 homosexuals, like other citizens, can lobby their representatives on all issues not directly resolved by the people in Amendment 2.

Amendment 2 is merely a substantive decision by Colorado citizens on the scope of the laws their government may enact. That respondents disagree with that decision does not mean that the Constitution grants them a right to see it reversed. To the contrary, this Court has been quite careful to explain that the Constitution guarantees only *access* to the ballot, not outcome. See, *e.g.*, *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 35 n.78 (1973) ("Since the right to vote, *per se*, is not a constitutionally

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that respondents urge here—extending the *Hunter* doctrine beyond suspect racial classifications, *id.* at 7, and expanding the ballot *access* cases to state actions that merely make "it more difficult for some kinds of governmental actions to be taken," *id.* at 5-6—in *affirming* a single issue supermajoritarian vote requirement.

protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population"); *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969) ("Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not").

Rhetoric aside, the fundamental right recognized by the Colorado Supreme Court is a *new* right.[5] That alone warrants immediate review by this Court, since as this Court has recognized, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986) ("There should be, therefore, great resistance to expand the substantive reach of [the Fourteenth Amendment], particularly if it requires redefining the category of rights deemed to be fundamental"); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33 ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws").

2. *Any* judicial creation of fundamental constitutional rights is cause for profound concern by this Court. Accordingly, respondents go to great lengths to assure the Court that the lower court confined the scope of its new fundamental right by limiting access to that right to members of "independently identifiable groups." In so arguing, respondents, like the court below, hopelessly conflate the narrow—and independent—"fundamental rights" and

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[5] Unlike respondents, the lower court candidly conceded as much. Pet. App. D-14 (noting that this Court's voting rights cases "are distinguishable from the present controversy," but discovering a "common thread" justifying a broader right against "unequal burdens on identifiable groups").

"suspect classifications" exceptions to the traditional presumption of constitutionality that attaches to States' laws. Under existing constitutional theory, any state action burdening individuals' fundamental rights triggers heightened scrutiny, regardless of the identity of the persons whose rights are burdened. By contrast, a state classification that burdens a suspect class triggers strict scrutiny regardless of the issues involved. Combining the two concepts into a "fundamental right" that triggers heightened scrutiny only for the new "suspect class" of "independently identifiable groups" is unprecedented.

As respondents' briefs make clear, it is also unworkable and can only lead to intrusive federal review of any state efforts to restructure political subdivisions or to reallocate authority between the people and their representatives. Indeed, respondents' constitutional theory would seemingly invalidate *all* decisions made directly by the people precisely and only because such decisions by definition prevent representatives—a lower governmental authority—from making a different decision.

Respondents' assurance that limiting strict scrutiny to *independently* identifiable groups will quiet this revolution in equal protection jurisprudence is no more than sleight of hand. Respondents argue, for example, that Colorado's constitutional term limit provision burdens only "persons who wish to reelect incumbents," a group respondents contend is "not identifiable independent of their desire to accomplish what the challenged provision forbids." Opp. 17. It takes little creativity, however, to note that incumbents themselves are burdened by that provision (and are indeed its target). As respondents explain it, a group is "independently identifiable" and thus entitled to strict scrutiny "whenever its members are united by some common characteristic that is not simply created by the referendum requirement that the individual members are united in opposing." Opp. 9-10. The group of incumbents is independently defined by its members' positions as political officeholders, and is thus an "independently identifiable group."

Of course, it may be the case that not all members of the group of incumbents favor unlimited political careers. That argument proves too much, however, because respondents have not shown that *all* homosexuals favor quotas, preferences, or other governmental intrusions in private decisionmaking. Nor can they even show that a majority of the opponents of Amendment 2 were homosexual, even assuming, *arguendo*, that homosexuals comprise more than 2-3% of the general population. Thus, the only real "group" burdened by Amendment 2 is the 46.6% of Coloradans that voted against it. See Pet. App. B-2. As respondents would be quick to point out, however, *that* group is one of the few that is *not* "independently identifiable."

Indeed, it is difficult to imagine a referendum requirement that would *not* burden some independently identifiable group. State referenda outlawing prostitution, casino gambling, or drug use would be subject to strict scrutiny as burdening the "rights" of the independently identifiable groups of prostitutes, gamblers and drug users, respectively, to ask their representatives to sanction those activities. State licensing of doctors would trigger strict scrutiny because it deprived the independently identifiable group of doctors of their "right" to seek laxer standards from lower political subdivisions. But see *Williamson* v. *Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955). A state ban on smoking in public places would be subject to strict scrutiny because it "fenced out" smokers from the local political process. A state constitutional requirement that school financing be based upon property taxation would trigger strict scrutiny because it "targets" the independently identifiable group of children in relatively poor districts. But see *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1 (1973). And a State that barred legislative consideration of government funding of abortions would burden the "right" of the independently identifiable group of indigent women to demand such benefits. But see *Maher* v. *Roe*, 432 U.S. 464 (1977). Viewed realistically, the decision below essentially eliminates the

ability of the people of a State to limit the legislative goals of their representatives.[6]

3. Throughout their briefs in opposition, respondents resort to characterizations of the effects of Amendment 2, of the "state's motivations" in enacting Amendment 2, and of the scientific evidence relating to the genetic and social origins of sexual orientation, that are as erroneous as they are irrelevant. Thus, respondents are simply wrong in asserting that Amendment 2 would "authorize" discrimination against homosexuals in "state employment" or that it would "immunize" public discrimination "from regulation or redress at any level of government." Opp. 2. Amendment 2 does not repeal the Equal Protection Clause of the Fourteenth Amendment, and homosexuals, like everyone else, remain free to challenge government discrimination. All that Amendment 2 does is reserve to the people the decision whether, *unlike* most individuals, homosexuals are deserving of *more* protections or *greater* benefits than the general populace.[7] And the question

[6] *Cf. Sugarman* v. *Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) ("Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road").

[7] Respondents also claim that the "state admits that the purpose of Amendment 2 is to . . . express disapproval toward lesbians, gays, and bisexuals." Opp. 13. The State admits no such thing. The testimony and affidavit respondents cite in support of their claim in fact make clear that the witnesses held exactly the opposite view. Record at 15:839, 853 ("Q. What sorts of legal protections did you believe existed after Amendment 2 had passed and [was] implemented? A. Well, the right to petition, the right to lobby politically, the right to conduct business, the right to freely associate, every right that has been recognized as fundamental to every citizen"); Aff. of John Finnis ¶ 15 ("The standard modern position is consistent with the view that . . . it is unjust for A to impose any kind of disadvantage on B simply because A believes (perhaps correctly) that B has sexual inclinations (which B may or may not act on) towards persons of the same sex"). In any event, Amendment 2 was passed not by the "state," but by a majority of the *voters*, and there is no evidence that in making it more difficult for homosexuals to obtain *special* treatment, these voters intended to express "disapproval" of homosexuals.

whether homosexuals *are* deserving of special protections is simply irrelevant here because, as respondents concede, this is *not* a suspect class case.[8]

The decision below must be defended, if at all, on its holding that *all* "independently identifiable groups" have a fundamental constitutional right to determine which political subdivisions will consider the issues important to them. It is unsurprising that respondents prefer to divert attention from that issue. At bottom, the decision below has transformed an internal state political battle into a federal constitutional war. A group with substantial political power, see Pet. App. C-18, exercised that power in a general election and attracted nearly 47% of the State's voters to its position. It ultimately lost the election, but no individual was denied the right to participate fully in the political process. The process constitutionally available to respondents to alter Amendment 2 is the same as that which brought it into existence in the first place—the will of the people expressed through the ballot box. The decision below, however, grants respondents—and every other "group" that loses a political battle—a constitutional "right" simply to demand that the offending decision be undone. Because that new "right" directly threatens state autonomy and places into constitutional doubt all attempts by state (*or* federal) governments to preempt lower governmental powers, the decision below plainly is worthy of review by this Court.

[8] In their zeal to run away from the suspect class inquiry, respondents also highlight the absurdity of a constitutional scheme that would subject a State's efforts affirmatively to harm homosexuals—even to the point of criminalizing homosexual conduct—to only rational basis scrutiny, but would subject that State's decision *not* to grant homosexuals special benefits unavailable to the general populace to strict scrutiny. *See* Opp. 15 ("If the state were to enact new laws putting other, special burdens on lesbians, gay men and bisexuals, the standard of review would not be governed by *Evans*"). *Compare Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986).

4. Finally, there is no legitimate reason not to review this critically important issue now. The decision below—affirming the trial court's entry of a *permanent* injunction barring the enforcement of Amendment 2—is unquestionably final; unless this Court grants review, Amendment 2 is dead. Nor does the fact that this unprecedented federal constitutional ruling was issued from a state supreme court, rather than a federal court, see Opp. 22, justify delay. Indeed, under respondents' theory there could be no review of state supreme court decisions invalidating state constitutional amendments on federal constitutional grounds. But see, *e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, Nos. 93-1456 and 93-1828 (cert. granted June 20, 1994).[9] The issue raised here is simply too important and too far-reaching to postpone the inevitable day when it must be resolved by this Court.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] The fact that the decision below has deterred efforts by other States to enact limits on their representatives' ability to grant extra-constitutional protections to homosexuals is a reason to grant, not deny, review of the case. In any event, the holding below granting new fundamental rights to "any identifiable group" has importance well beyond the narrow context of homosexual rights.

[10] As respondents concede, their "other equal protection theory"—that Amendment 2 fails rational basis scrutiny—can be addressed here. Contrary, to respondents' claims, however, Amendment 2 easily passes rational basis scrutiny. *See, e.g., Williamson* v. *Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (Courts cannot in the name of the Constitution overturn duly enacted state constitutional provisions simply "because they may be unwise, improvident, or out of harmony with a particular school of thought").

Respectfully submitted,

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